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Pleading the Statute of Frauds or Statutes of Limitations in Pennsylvania: A Need for Reform

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Comments

Pleading the Statute of Frauds or Statutes of Limitations in Pennsylvania: A Need for Reform

The Pennsylvania Rules of Civil Procedure provide two distinct methods for raising as a defense the bar of the Statute of Frauds or a statute of limitations. Every such defense may be pleaded as an affirmative defense under the caption, "New Matter,"[1] to be considered on a motion for summary judgment[2] or at trial; but certain of these statutes may also be raised and considered on a preliminary objection in the nature of a special demurrer.[3] For counsel and court alike, problems arise in determining which statutes may be pleaded earlier as a preliminary objection. The rules and the cases purport to apply a distinction based upon the nature and effect of the statutory provision in question. However, the conceptual fiber of this distinction has proven too elusive in distinguishing the many similar statutes. As a result, the bar of the Statute of Frauds or a statute of limitations is often improperly or inefficiently raised.[4]

I. Understanding the Basis for Distinction

A. *Introduction*

The primary cause of confusion in this area of practice is a conceptual analysis and classification of the statutes which determines when the bar of a particular statute can be invoked.[5] To understand

1. *See* Pa. R. Civ. P. 1030.

2. *See id.* 1035.

3. *See id.* 1017(b). The applicability of the statute must appear on the face of the complaint or counterclaim.

4. The arguments and suggestions for reform in this comment are made in recognition of the need for commentary to aid in the difficult task of formulating effective procedural rules. *See* Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. Pa. L. Rev. 909, 911-12 (1953).

5. Pa. R. Civ. P. 1017(b)(4) provides that a preliminary objection in the nature of a demurrer "may include the bar of a *nonwaivable* statute of limitations or frauds *which bars or destroys the right of action* and the applicability of which appears on the face of the complaint or counterclaim . . . ." *Id.* (emphasis added). However, the wording chosen by the rule does not provide a clear basis for discriminating among the various statutes. For example, is a "nonwaivable" statute one "which bars or destroys the right of action"? As

this analysis, it is necessary to review the early case law from which it originated. An interpretive distinction developed in the Pennsylvania cases dealing with the provisions of the Statute of Frauds and the statutes of limitations between (1) those enactments which affirmatively conditioned the legal rights subject to the statute, and (2) those statutes which had no such independent effect. For procedural purposes, this distinction was necessary to determine which statutes could be invoked at trial though not pleaded. Statutes in the former category were deemed to have substantive effect even if not raised in the pleadings and thus could be raised at trial, whereas statutes in the latter were considered permissive defenses which would be waived if not raised in the pleadings.[6] Thus, those statutes of limitations which were interpreted as conditions put by law on the existence of the legal right, often labeled statutes of repose, placed upon the plaintiff[7] the "mandatory" burden of showing that the action was timely, and could be taken advantage of by the defendant at trial though not pleaded.[8] Conversely, a *true* statute of limitations did not of itself limit the plaintiff's right to bring the action within the prescribed period. Such statutes could only be availed of when pleaded.[9] This distinction similarly developed for the provisions of the Statute of Frauds; those which were "substantive," rendering oral agreements "unenforceable," could be invoked at trial even if they had not been pleaded, since these statutes affirmatively required proof of compliance.[10]

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indicated in the text, the historical development of the distinction employed by rule 1017(b)(4) may provide a better understanding of the standard adopted under the rule.

6. *See* 4 M. LEWIS, STANDARD PENNSYLVANIA PRACTICE 101-04 (rev. ed. 1955).

7. The terms "plaintiff" and "defendant" will often be used in this comment. It should be noted that their usage is predicated on the assumption that a complaint is the subject of inquiry, and that the same principles apply if a counterclaim is concerned.

8. *E.g.*, Guy v. Stoecklein Baking Co., 133 Pa. Super. 38, 45-46, 1 A.2d 839, 842-43 (1938). Bringing suit within the period of limitations was considered to be a condition precedent to the existence of the legal right. For an excellent discussion, see Swartz v. Great American Ins. Co., 65 York 91, 78 Pa. D. & C. 376 (C.P. 1951).

9. *E.g.*, Barclay v. Barclay, 206 Pa. 307, 310, 55 A. 985, 986 (1903):

> It is not a defense absolute of which the court will take judicial notice on the plaintiff's presentation of his case, either in his declaration or at the trial, for if the defendant does not choose to make it, it is not a part of the case at all.

10. *E.g.*, Bayard v. Pennsylvania Knitting Mills Corp., 290 Pa. 79, 86-87, 137 A. 910, 913 (1927); Mason-Heflin Coal Co. v. Currie, 270 Pa. 221, 113 A. 202 (1921).

> There is a vital distinction between cases where the claim was originally enforceable by suit, but recovery thereof may or may not have been lost by a failure to bring it within the time prescribed by the statute of limitations; and those, like the present, where the claim never was enforceable unless the statutory requirements were ob-

At the time, this distinction served another procedural purpose. A technique was needed for determining which provisions of the Statute of Frauds or statutes of limitations could be raised by demurrer, and it was felt that this method of interpreting the statutes was an appropriate manner of discriminating among the various provisions.[11] The reasoning behind this development was logical and perhaps inevitable, given its narrow premise. In Pennsylvania, a demurrer could be sustained only if the complaint failed to *state* a cause of action upon which recovery could be had. A complaint which failed to show that the conditions of a mandatory or substantive statute had been met failed to *state* a legally sufficient cause of action. Accordingly, such a statute could properly be raised by demurrer. Conversely, those statutes which did not affirmatively condition the legal right had no independent effect on the complaint or counterclaim. These statutes did not require allegations of compliance, and the complaint nevertheless *stated* a cause upon which relief might be granted. Consequently, such statutes could not be raised at the demurrer stage of the proceedings.[12]

B. *Later Development*

When the Pennsylvania Rules of Civil Procedure were first adopted,[13] the appropriate provisions were interpreted as requiring

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served. Under the former, the facts necessary to take the case out of the statute need not be set forth; under the latter . . . they must be averred in order to show a recovery may be had under the statute. Were the question res nova we would hesitate ere we decided not to so require in both classes of cases.

Id. at 223, 113 A. at 203 (citations omitted) (construing Sales Act of May 19, 1915, No. 241, § 4, [1915] Laws of Pa. 543).

11. *See, e.g.*, Leonard v. Martling, 378 Pa. 339, 106 A.2d 585 (1954).

12. The Pennsylvania Rules of Civil Procedure have adopted the system of pleading labeled "fact-pleading." *See* PA. R. CIV. P. 1019(a): "The material facts on which a cause of action or defense is based shall be stated in a concise and summary form." For those conversant with the distinction between "cause of action" and "claim," *see, e.g.*, Garcia v. Hilton Hotels Int'l, Inc., 97 F. Supp. 5 (D.P.R. 1951), the complaint must establish the former. However, the Pennsylvania Rules of Civil Procedure apparently fail to distinguish the two. *Compare* PA. R. CIV. P. 1019(a) ("cause of action"), *with* PA. R. CIV. P. 1032 ("claim"). Consequently the two will be used interchangeably in this comment. The essential principle remains that pleading in Pennsylvania is "fact-pleading."

13. The Pennsylvania Rules of Civil Procedure governing Actions at Law were first adopted June 25, 1946, to become effective January 1, 1947, pursuant to the powers granted to the Supreme Court of Pennsylvania by PA. STAT. ANN. tit. 17, §§ 61-66 (1962). *See also* PA. CONST. art. V, § 10. Prior to the adoption of the rules, procedure was governed by a series of Pennyslvania Practice Acts, *e.g.*, Act of May 14, 1915, No. 202, [1915] Laws of Pa. 483, and by the common law forms of practice and procedure.

that *all* defenses of the Statute of Frauds or statutes of limitations be pleaded as affirmative defenses under the heading "New Matter."[14] It was felt that no distinction was intended between statutes which affirmatively conditioned the right and those which did not.[15] This position was logical, since rule 1030 provided that defenses of the Statute of Frauds or statutes of limitations "*shall be pleaded* in a responsive pleading under the heading 'New Matter.' "[16] A literal reading of the rules precluded raising these statutory defenses by preliminary objection.[17]

This simple view did not prevail for long. Lower court cases indicated that the distinction established prior to the adoption of the rules had survived,[18] and in *Leonard v. Martling*,[19] the Supreme Court of Pennsylvania confirmed these indications. The precise issue in *Leonard* was whether the relevant bar of the Statute of Frauds[20] could be raised at trial even though it had not been pleaded.[21] The court considered rule 1032[22] controlling. This rule provided that any defense or objection would be waived if not pleaded by preliminary objection or answer; however, failure to state a claim upon which relief could be granted could nevertheless be raised at trial.[23] Since the pertinent inquiry concerned the sufficiency of the complaint, the court resorted to the historical distinction. Reasoning that the statute at bar was a limitation "upon the

14. Cohen v. Weiner, 66 Montg. 306, 73 Pa. D. & C. 477 (C.P. 1950); *cf.* Martin v. Wilson, 371 Pa. 529, 92 A.2d 193 (1952).

15. *Compare* Cohen v. Weiner, 66 Montg. 306, 73 Pa. D. & C. 477 (C.P. 1950) (Sales Act of May 19, 1915, No. 241, § 4, [1915] Laws of Pa. 543, may not be pleaded as preliminary objection), *with* Mason-Heflin Coal Co. v. Currie, 270 Pa. 221, 113 A. 202 (1921) (same act may be raised by demurrer).

16. PA. R. CIV. P. 1030, *quoted in* Cohen v. Weiner, 66 Montg. 306, 307, 73 Pa. D. & C. 477, 479 (C.P. 1950).

17. It would seem that in the absence of an effective summary judgment procedure, this required defendants to wait until trial to prevail on a legal defense. PA. R. CIV. P. 1035, permitting summary judgment, was first promulgated in 1966.

18. Swartz v. Great American Ins. Co., 65 York 91, 78 Pa. D. & C. 376 (C.P. 1951); Dyno v. Rafferty, 52 Lack. Jur. 190, 77 Pa. D. & C. 47 (C.P. 1951).

19. 378 Pa. 339, 106 A.2d 585 (1954).

20. PA. STAT. ANN. tit. 33, § 3 (1967).

21. The defendant had moved for judgment on the pleadings in the nature of a statutory demurrer on the grounds of the Statute of Frauds before the jury was sworn in. 378 Pa. at 341, 106 A.2d at 586.

22. PA. R. CIV. P. 1032.

23. 378 Pa. at 342, 106 A.2d at 586, *citing* PA. R. CIV. P. 1032. For other exceptions to the rule of waiver, see PA. R. CIV. P. 1032.

judicial authority to provide remedies,"[24] the court concluded that the statute was substantive. A complaint which did not establish that the contract sued upon met the requirements of such a statute did not state a claim upon which relief could be granted. As before the promulgation of the rules, failure to plead such a statute would not preclude the defendant from raising it at trial.[25]

The court's rationale in *Leonard* necessarily implied that substantive statutes could be raised by demurrer.[26] Despite this, lower courts were still split over whether any bar of the Statute of Frauds or statute of limitations could be raised by preliminary objection.[27] Moreover, even accepting that some statutes might be raised by demurrer, it was not clear that only substantive or mandatory ones would share such an honored status. The supreme court obtained the opportunity to directly address these issues in *Brown v. Hahn*,[28] and in articulating the appropriate procedure, held that only those statutes which independently operated to bar the plaintiff's cause of action, by placing mandatory conditions upon a showing for recovery, could be pleaded by preliminary objection.[29] The court ex-

24. 378 Pa. at 343, 106 A.2d at 586.

25. Two important points should be noted in regard to *Leonard*. First, as authority for the proposition that the Statute of Frauds provision before the court placed an affirmative condition upon recovery, the court cited *In re* Purman's Estate, 334 Pa. 238, 5 A.2d 906 (1939). In that case, the supreme court expressly declared that, while PA. STAT. ANN. tit. 33, § 3 (1967) placed a limitation upon the judicial authority to afford a remedy, it did not render the transaction invalid; only when an action was brought on the oral promise did the statute apply to render the agreement unenforceable. 334 Pa. at 245, 5 A.2d at 909. Second, the *Leonard* court was cautious to distinguish Sferra v. Urling, 328 Pa. 161, 195 A. 422 (1937), which had held that PA. STAT. ANN. tit. 33, § 1 (1967) could not be raised for the first time *on appeal*. The *Leonard* court felt that since the defendants in *Sferra* had failed to bring the statute to the attention of the court at any stage of the trial proceedings, they had clearly waived their right to plead the defense. 378 Pa. at 343-44, 106 A.2d at 586-87; *accord*, PA. R. CIV. P. 1032.

26. 378 Pa. at 343, 106 A.2d at 586, *citing, e.g.*, Mason-Heflin Coal Co. v. Currie, 270 Pa. 221, 113 A. 202 (1921).

27. *See* Brown v. Hahn, 419 Pa. 42, 49 n.6, 213 A.2d 342, 345 n.6 (1965).

28. 419 Pa. 42, 213 A.2d 342 (1965).

29. The supreme court expressed the distinction and its application to the pleading problem lucidly:

> Whether the Statute of Frauds *must* be raised *only* as an affirmative defense under Rule 1030 or *may* be raised by preliminary objections in the nature of a demurrer depends initially upon the language and nature of the provisions of the particular Statute of Frauds involved.
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> In the promulgation of the Rules of Civil Procedure it was intended to retain the historic distinction between those statutes which affect the right of a plaintiff to bring an action and those statutes which merely present the defendant with a permissive

pressly adopted the historical distinction.[30]

The *Brown* court aptly illustrated the distinction by citing and discussing *Leonard* as a case involving a statute[31] which could be raised by demurrer. This conclusion was based on the observation that the statute in *Leonard* "provided 'no action shall be brought' upon an oral guaranty unless it be in writing or there be some written memorandum thereof."[32] Such a provision went directly to the right to bring the action and was a substantive rule of law.

When called upon to apply the distinction to the case at hand however, the *Brown* court deferred to *Sferra v. Urling*.[33] Stating that *Sferra* construed this very Statute of Frauds[34] "as not affecting the right of a plaintiff to maintain the action but simply affording a permissive defense to the defendant,"[35] the *Brown* court held that the particular statute could not be raised as a preliminary objection. However, it is questionable whether *Sferra* construed the statute in this manner. The issue in *Sferra* was whether the statute could be raised for the first time on appeal. The *Sferra* court reasoned that it could be so raised only if it acted to "outlaw" the oral transaction in question, rendering the latter void in all respects.[36] While holding that the statute was not of this nature, the *Sferra* court expressly acknowledged that the statute could nevertheless be a substantive

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defense which might be waived by the defendant if not asserted. Stated otherwise, if the particular Statute of Frauds operates to bar or destroy the plaintiff's right of action, irrespective of the action of the defendant, such statute may be raised by preliminary objections under Rule 1017(b); however, if the particular Statute of Frauds merely gives the defendant a waivable defense, the plaintiff will have stated a cause of action to which the defendant may, if he chooses, defend on the ground of the statute and, under such circumstances, the statute must be asserted under "New Matter" under Rule 1030.

Id. at 46-47, 213 A.2d at 344.

30. *See* notes 5-12 and text accompanying *supra*. *See also* Leonard v. Martling, 378 Pa. 339, 342-44, 106 A.2d 585, 586 (1954), and cases cited therein.

31. PA. STAT. ANN. tit. 33, § 3 (1967).

32. 419 Pa. at 47, 213 A.2d at 345.

33. 328 Pa. 161, 195 A. 422 (1937).

34. PA. STAT. ANN. tit. 33, § 1 (1967).

35. 419 Pa. at 48, 213 A.2d at 345.

36. *See* McMeekin v. Prudential Ins. Co. of America, 348 Pa. 568, 571, 36 A.2d 430, 431 (1944):

After a trial on the merits, no defect of pleading, which could have been raised before trial, will be fatal to the judgment, unless it is shown to have injuriously affected the trial.

See also Brandon v. McKinney, 233 Pa. 481, 82 A. 764 (1912); Eckert v. Schoch, 155 Pa. 530, 26 A. 654 (1893); note 25 *supra*.

rule of law limiting the judicial authority to provide a remedy.[37] Even such statutes could be waived if not pleaded before the close of trial proceedings.[38] *Sferra* left unanswered the question whether the applicable Statute of Frauds was mandatory, and it was the duty of the court in *Brown* to accurately apply its test to the statute at hand.[39] While the *Brown* court's failure to do so seriously affects the soundness of the result, the test espoused is capable of more successful application.

In 1969, the Pennsylvania Rules of Civil Procedure were amended to explicitly incorporate the practice and reasoning condoned by *Brown*.[40] Rule 1017(b) now reads:

> (b) Preliminary objections are available to any party and are limited to
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> . . . .
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> (4) a demurrer, which may include the bar of a nonwaivable statute of limitations or frauds which bars or destroys the right of action and the applicability of which appears on the face of the complaint or counterclaim . . . .[41]

Accompanying amendments were made to rules 1030 and 1045(b) indicating that the Statute of Frauds and statutes of limitations are to be raised by new matter in the answer only if not already properly raised by preliminary objection.

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37. 328 Pa. at 167-69 & n.4, 195 A. at 425-27 & n.4.

38. *Id.* at 168 n.4, 195 A. at 426 n.4; *accord*, PA. R. CIV. P. 1032. The reasoning behind requiring the defendant to raise such a defense during some stage of the trial proceedings is well founded. Unless the statute declares absolutely invalid the underlying oral agreement, the defendant should be required to put the plaintiff on notice that he intends to plead its protections. The plaintiff could reasonably believe that the defendant was admitting to the existence of the contract, and fail to produce evidence which might take the agreement out of the statute. *See* American Prods. Co. v. Refining Co., 275 Pa. 332, 119 A. 414 (1923), where the court permitted a mandatory provision of the Statute of Frauds to be raised after verdict on a motion for judgment non obstante veredicto only if plaintiff were permitted to show proof of the inapplicability of the statute.

39. *See* Blumer v. Dorfman, 447 Pa. 131, 135, 289 A.2d 463, 466 (1972).

40. *See* P. AMRAM, GOODRICH-AMRAM STANDARD PENNSYLVANIA PRACTICE Rule 1017 at 245 (Supp. 1&2 March, 1976) [hereinafter cited as GOODRICH-AMRAM]; *accord, e.g.*, Ziemba v. Hagerty, 436 Pa. 179, 180-81, 259 A.2d 876 (1969).

41. PA. R. CIV. P. 1017(b).

II. Application of the Historical Distinction

The confusion apparent to the supreme court in *Brown* has not been diffused, and in fact, seems to be more prevalent now than before.[42] This generally stems from a misunderstanding of the "historical distinction" endorsed by *Brown* or from a failure to appropriately apply the difficult conceptual distinction to the statute in question. In discussing the various cases in which rule 1017(b)(4) has been applied, the development leading to the present language of the rule must be remembered. The policy of *Brown* carrying over the historical distinction should prevail whenever doubt exists as to the meaning of rule 1017(b)(4).

A. *What is a "Nonwaivable" Statute?*

In considering the scope of rule 1017(b)(4), emphasis has been consistently placed on whether the particular statute is "nonwaivable."[43] Since the term is not self-defining but varies with context, courts and lawyers have struggled with its meaning. It has been pointed out that this criterion seems unnecessary and is confusing in light of rule 1032 which provides that all defenses and objections with limited exceptions are waived unless pleaded.[44] The solution to this apparent dilemma and the key to an understanding of what is meant by a "nonwaivable" statute lies in one of these exceptions to rule 1032. "[T]he defense of failure to state a claim upon which relief can be granted"[45] may be raised until the close of trial. Such a defense is "nonwaivable" in the sense that, though it may not have been raised in the pleadings, its benefits will not be lost until the completion of trial proceedings. The historical distinction, it will be recalled, recognized mandatory or substantive statutes as requiring plaintiff's compliance with certain conditions as a prerequisite to recovery. When applicable and not satisfied, these statutes resulted in a failure to state a claim upon which relief could be granted, and were similarly "nonwaivable" for purposes of rule

42. I must respectfully disagree with Justice Pomeroy's assertion in Blumer v. Dorfman, 447 Pa. 131, 136, 289 A.2d 463, 466-67 (1972), to the contrary.

43. *E.g.*, Economy Bank v. Hickory Corral Enterprises, Inc., 32 Beaver 56, 57, 55 Pa. D. & C.2d 370, 372 (C.P. 1972); Yohey v. Lacoe, 51 Pa. D. & C.2d 448, 449-50 (C.P. Colum. Co. 1971).

44. Allwein v. Wilt, 13 Lebanon 198 (Pa. C.P. 1971).

45. Pa. R. Civ. P. 1032.

1032.[46] To interpret "nonwaivable" under rule 1017(b)(4) in conjunction with rule 1032 comports with the premise of *Brown*—preserving the historical distinction.

B. *The Goodrich-Amram Approach*

It has been suggested that rule 1017(b)(4) establishes a three-pronged test; only a statute (1) which cannot be waived, (2) which destroys the plaintiff's right of action, and (3) the applicability of which appears on the face of the complaint or counterclaim, can be raised by preliminary objection.[47]

Addressing the portions of this test in increasing order of complexity, initially it can be seen that the final requisite is clearly correct. Rule 1017(b)(4) explicitly requires that the facts triggering the application of the statutory defense appear on the face of the claim. Otherwise, a factual issue would exist which could not appropriately be disposed of by preliminary objection.[48]

In contrast, the second requisite appears inaccurate, for the plain language of rule 1017(b)(4) includes any statute which "*bars or* destroys the right of action."[49] Bypassing this difficulty for the moment, it becomes clear that any requirement that the statute bar

46. *See* Leonard v. Martling, 378 Pa. 339, 106 A.2d 585 (1954).

47. GOODRICH-AMRAM, *supra* note 40, Rule 1017 at 245 (Supp. 1&2 March, 1976); *accord*, Stoltzfus v. Haus, 334 A.2d 738, 741 (Pa. Super. 1975). *See* Mikula v. Harrisburg Polyclinic Hosp., 94 Dauph. 328, 58 Pa. D. & C.2d 125 (C.P. 1972); Rusch v. Evans, 53 Westmoreland 173, 176-77 (Pa. C.P. 1971).

48. If, given the facts alleged by the plaintiff the statute did not apply, it is obvious that the statute could not bar the claim of itself. If the statute were to be pleaded by the defendant, he would have to allege facts which would make it applicable. This would raise an issue of fact.

While PA. R. CIV. P. 1028(c) provides for the taking of evidence whenever factual issues are raised by preliminary objection, the clear intent of rules 1017 and 1028 is that evidence not be taken to determine the applicability of the Statute of Frauds or a statute of limitations. Rather, such a procedure is designed to aid, for example, in the determination of jurisdictional objections, where factual issues could often arise and be dispositive. *See* PA. R. CIV. P. 1017(b).

49. PA. R. CIV. P. 1017(b)(4) (emphasis added). However, it will be admitted that the actual holding of *Brown* if accepted as correct justifies the assertion that the statute must destroy the right of action. *See* notes 28-39 and text accompanying *supra*. But if it is true that the statute must destory the right of action, Leonard v. Martling, 378 Pa. 339, 106 A.2d 585 (1954) is inconsistent, since the statute therein did not destroy the cause of action and it was stated that it could be raised by demurrer. *See* notes 19-25 and text accompanying *supra*. Finally, to require that the statute "destroy" the cause of action would be plainly inconsistent with the historical distinction adopted by *Brown* as it has been applied to some statutory provisions which do not *destroy* a cause of action but merely *bar* recovery (no cause of action exists) unless compliance with the statutory mandate is alleged.

or destroy the claim is superfluous to the requirement of the rule that the statute be "nonwaivable." As previously discussed, a "nonwaivable" statute for purposes of rule 1017(b)(4) is one which will not be waived by failure to plead so long as it is raised before the termination of trial proceedings.[50] These statutes are limited to those which result in a failure to state a sufficient claim.[51] Only mandatory or substantive statutes have this effect, and each of these by its nature "bars or destroys the right of action."[52] The language to this effect in the rule must be regarded merely as reinforcing the requirement that the statute be "nonwaivable."

The first portion of the Goodrich-Amram test requires that the statute be one "which cannot be waived." This parallels the tendency of courts to determine the procedural attributes of a statute by inquiring whether it is "waivable," reasoning that if a "nonwaivable" statute can be pleaded as a preliminary objection a "waivable" one cannot.[53] Accordingly, the inquiry is whether a particular statute "is capable of being waived."[54] Both of these standards, however, fail to indicate what type of capability is involved. For instance, a party *can* waive the protection of *any* provision of the Statute of Frauds by admitting in writing or under oath to the existence of the oral agreement.[55] Yet certain of these statutes have

50. *See* PA. R. CIV. P. 1032.

51. *Id.*

52. *Id.* 1017(b)(4).

53. *E.g.*, Blumer v. Dorfman, 447 Pa. 131, 135, 289 A.2d 463, 466 (1972); Royal Oil & Gas Corp. v. Tunnelton Mining Co., 444 Pa. 105, 107, 109, 282 A.2d 384, 385, 386 (1971); Stoltzfus v. Haus, 334 A.2d 738, 741 (Pa. Super. 1975); McCleary v. Barrow, 87 York 21 (Pa. C.P. 1973); Spanard v. Duquesne Light Co., 118 Pitt. L.J. 354, 355 (Pa. C.P. Allegh. Co. 1970).

54. Blumer v. Dorfman, 447 Pa. 131, 135, 289 A.2d 463, 466 (1972).

55. *See* Sferra v. Urling, 328 Pa. 161, 167, 195 A. 422, 425 (1937), and cases cited therein. The admission would clearly be a sufficient memorandum of the agreement: "[U]nder a statute designed to guard against fraud and perjury in oral contracts there can be no danger when the contract is admitted, since it is not within the mischief intended to be guarded against." *Id. See also* Leonard v. Martling, 378 Pa. 339, 106 A.2d 585 (1954). Only under statutes which totally destroy *any* legal relationship could the converse be true.

In Williams v. Moodhard, 341 Pa. 273, 19 A.2d 101 (1941), it was held that an oral trust in contravention of PA. STAT. ANN. tit. 33, § 2 (1967) would become valid and enforceable if admitted in the course of litigation by the trustee. In Safe Deposit & Trust Co. v. Diamond Coal & Coke Co., 234 Pa. 100, 83 A. 54 (1912), that very statute was held to be a limitation on judicial authority to provide a remedy, requiring the plaintiff to show compliance as a condition to recovery. And even those statutes of limitation which are mandatory conditions upon recovery can be waived in the sense that the conduct or declarations of the parties may toll the running of the statute. *See* Guy v. Stoecklein Baking Co., 133 Pa. Super 38, 46, 1 A.2d 839, 843 (1938). *See generally* Suchan v. Swope, 357 Pa. 16, 53 A.2d 116 (1947); Zlotziver

been deemed "nonwaivable."[56] In this context, the meanings of "waivable" and "nonwaivable" can become complementary only if "waivable" statutes are limited to those which will be involuntarily waived under rule 1032 when not pleaded as a defense or objection, and if "nonwaivable" ones are deemed those "which will not be waived" under such circumstances. This approach, while consistent with the earlier discussion of "nonwaivable," has not been expressed by the courts; instead, for example, statutes have been labeled "waivable" upon a showing that the defense may be voluntarily waived.[57]

C. *The Historical Approach*

It is encouraging to note that some courts have accurately applied the historical distinction adopted by the rules in determining when a particular statutory defense could be raised. In *Bellotti v. Spaeder*,[58] the supreme court indicated that the statute of limitations in question could not be raised by demurrer because it did not

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v. Zlotziver, 355 Pa. 299, 49 A.2d 779 (1946); Shaffer v. Shaffer, 344 Pa. 158, 23 A.2d 883 (1942); Metzger v. Metzger, 338 Pa. 564, 14 A.2d 285 (1940).

56. *E.g.*, PA. STAT. ANN. tit. 33, § 3 (1967). *See* Blumer v. Dorfman, 447 Pa. 131, 289 A.2d 463 (1972); notes 19-25 and text accompanying *supra*.

57. This has seemed particularly true where statutes of limitation are concerned. *See* notes 87-98 and text accompanying *infra*.

One caveat must be made in regard to what has just been said. In the development of this distinction between statutes based upon nature and effect, courts have seemed more willing to interpret the Statute of Frauds provisions as substantive conditions on enforceability and less likely to interpret the various statutes of limitation as mandatory conditions upon recovery. *See* 3 M. LEWIS, STANDARD PENNSYLVANIA PRACTICE 162-63, 223-24 (1952). Generally, only those statutes of limitations which were part of the statute granting the right were deemed mandatory. *E.g.*, PA. STAT. ANN. tit. 77, § 871 (1952) (Workmen's Compensation Act); *see* Overmiller v. D.E. Horn & Co., 191 Pa. Super. 562, 159 A.2d 245 (1960). Often these were described as *destroying* the right of action, and there are intimations in the opinions that they are expressions of legislative intent which cannot be voluntarily waived after the period has run. *See, e.g.*, Commonwealth *ex rel.* Fenton Storage Co. v. McClane, 154 Pa. Super. 246, 248, 35 A.2d 745, 745-46 (1944). Every such statute will be nonwaivable in the sense that failure to plead will not affect the ability of the court to consider the defense at trial.

Following this portion of the historical distinction, some recent opinions have indicated that the test under rule 1017(b)(4) is whether the statute is a "defense absolute" of which the court can take judicial notice. *E.g.*, Stoltzfus v. Haus, 334 A.2d 738, 740 (Pa. Super. 1975). It is suggested that while this may be an accurate description for some statutes of limitation, it is not the appropriate *test* for determining when such statutes may be raised. It is but a *result* of application of the appropriate test: whether the statute places a mandatory condition upon recovery such that failure to allege avoidance is a failure to state a legally sufficient cause of action.

58. 433 Pa. 219, 249 A.2d 343 (1969).

place a mandatory condition upon the right to recover.[59] Similarly, lower court cases have lucidly applied the "substantive" test to determine whether a particular Statute of Frauds could be pleaded as a preliminary objection.[60] Other cases however have employed the distinction endorsed by the rules improperly. A primary cause of much misdirection has been a failure to accurately analyze the statutory language to determine whether it places mandatory conditions upon the right of recovery. Instead, too great a reliance has been placed upon cases which have themselves not adequately resolved this issue.[61] For example, in *Holzer v. Masters*,[62] the court of common pleas was asked to determine that the statute of limitations at bar[63] was nonwaivable and could be raised by preliminary objection. The court declined to so hold, basing its decision on four inapplicable supreme court decisions. While each of these four decisions had addressed the propriety of raising the statute of limitations by demurrer, none had dealt with the specific statutory provision in question.[64] The court's failure in *Holzer* to attempt a reasoned analysis of the nature and effect of the statute at bar exemplifies the imprecision with which even the clearest test could be employed.[65] Efficient administration of the distinction mandates a separate determination of the effects of each statute.[66]

Even when it is recognized that the statute must be analyzed to determine whether it was intended to place a mandatory condition

59. *Id.* at 221 & n.2, 249 A.2d at 344 & n.2. The issue before the *Bellotti* court was whether the statute could be the basis of a motion for judgment on the pleadings pursuant to PA. R. CIV. P. 1034. In deciding that it could not, the court had to employ the same historical distinction. *See* Goldman v. McShain, 432 Pa. 61, 247 A.2d 455 (1968); notes 116-25 and text accompanying *infra*. *See also* Commonwealth *ex rel.* Fenton Storage Co. v. McClane, 154 Pa. Super. 246, 35 A.2d 745 (1944); Swartz v. Great American Ins. Co., 65 York 91, 78 Pa. D. & C. 376 (C.P. 1951).

60. Texas Truck Sleeper Co. v. Artman, 55 Westmoreland 13, 62 Pa. D. & C.2d 663 (C.P. 1973); United Farmers Cooperative v. Zausner, 61 Lanc. L. Rev. 279 (Pa. C.P. 1968).

61. *E.g.*, Brown v. Hahn, 419 Pa. 42, 213 A.2d 342 (1965).

62. 54 Westmoreland 69, 55 Pa. D. & C.2d 166 (C.P. 1972).

63. PA. STAT. ANN. tit. 12, § 31 (1953) (six year general statute of limitations).

64. All of these cases had dealt with the limitation for personal injuries, PA. STAT. ANN. tit. 12, § 34 (1953): Ziemba v. Hagerty, 436 Pa. 179, 259 A.2d 876 (1969); Goldstein v. Stadler, 417 Pa. 589, 208 A.2d 850 (1965); Marucci v. Lippman, 406 Pa. 283, 177 A.2d 616 (1962); Smith v. Pennsylvania R.R., 304 Pa. 294, 156 A. 89 (1931).

65. In Spanard v. Duquesne Light Co., 118 Pitt. L.J. 354 (Pa. C.P. Allegh. Co. 1970), the court similarly failed to appropriately determine whether the statute of limitations was nonwaivable. Citing Ziemba v. Hagerty, 436 Pa. 179, 259 A.2d 876 (1969), which dealt with PA. STAT. ANN. tit. 12, § 34 (1953), the court held that *id.* § 31 was waivable.

66. *E.g.*, Blumer v. Dorfman, 447 Pa. 131, 135, 289 A.2d 463, 466 (1972).

upon recovery, the difficult task of statutory interpretation remains. Since this process often results in inconsistent findings, it appears arbitrary. A comparison of the statutory provisions and the relevant interpretations thereof is illuminating.[67] These inconsistencies are understandable, since the possibility that judicial articulation in this regard accurately reflects the intention of the legislature is slight.[68] Thus, even a well-advised court may have difficulties applying the historical distinction.

III. How to Plead the Statute of Frauds or Statutes of Limitations

The principles behind rules 1017, 1030, 1032, and 1045 may be correlated into a few sentences. Any bar of the Statute of Frauds or a statute of limitations which does not place a mandatory or substantive condition upon recovery must be pleaded[69] and can only be pleaded as an affirmative defense in new matter.[70] Those statutes which independently condition recovery by requiring a showing of

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67. *Compare* Pa. Stat. Ann. tit. 33, § 3 (1967):

> *No action shall be brought* . . . to charge the defendant, upon any special promise, to answer for the debt or default of another, *unless the agreement* upon which such action shall be brought, or some memorandum or note thereof, *shall be in writing*, and signed by the party to be charged therewith . . . .

Id. (emphasis added)(held "nonwaivable" in Blumer v. Dorfman, 447 Pa. 131, 289 A.2d 463 (1972)), *with* Pa. Stat. Ann. tit. 68, § 250.202 (1965):

> *Any such lease* [longer than three years] *must be in writing* and signed by the parties making or creating the same, *otherwise* it shall have the force and effect of a lease at will *only and shall not be given any greater force or effect either in law or equity* . . . .

Id. (emphasis added) (held "waivable" in Blumer v. Dorfman, *supra*), *and* Pa. Stat. Ann. tit. 12, § 34 (1953):

> *Every suit hereafter brought* to recover damages for injury wrongfully done to the person . . . *must be brought* within two years from the time when the injury was done *and not afterwards* . . . .

Id. (emphasis added) (held "waivable" in Ziemba v. Hagerty, 436 Pa. 179, 259 A.2d 876 (1969)).

68. *Cf.* Manufacturers Light & Heat Co. v. Lamp, 269 Pa. 517, 112 A. 679 (1921). "*Statutes*, such as the one with which we are dealing, do not provide mere rules of evidence, but *are limitations upon the judicial authority to afford remedies.*" *Id.* at 520, 112 A. at 681 (emphasis added) (citations omitted).

69. Pa. R. Civ. P. 1032.

70. *Id.* 1017(b)(4), 1030, 1045. If thus properly pleaded it may form the basis for summary judgment under Pa. R. Civ. P. 1035, or where summary judgment is inappropriate, it may become dispositive once the facts are found at trial. As to the possibility of invoking such a defense on a motion for judgment on the pleadings under Pa. R. Civ. P. 1034 see notes 116-25 and text accompanying *infra*.

compliance will not be waived if the party seeking the protection fails to plead the statute,[71] and can be raised as a preliminary objection in the nature of a demurrer[72] or as an affirmative defense in new matter.[73] Choosing the permissible procedure in the given case necessitates a recognition and application of the historical distinction adopted and endorsed by *Brown v. Hahn*.[74] Where statutes of limitation are concerned, the statute can be raised by preliminary objection if it is in the nature of a mandatory condition placed upon the existence of the cause of action.[75] Provisions of the Statute of Frauds may be pleaded as preliminary objections when they are substantive, placing upon the party attempting to enforce the oral agreement the duty of showing that the statute has been fulfilled.[76]

Even under this test, care must be taken in deciding whether to plead a particular statutory defense as a preliminary objection. Many of the statutes have not been before the Pennsylvania appellate courts on this point, nor have they been interpreted to determine their nature and effect under the historical distinction. For these, the choice between preliminary objection and affirmative defense should be determined by reference to the interpretations of analogous statutory language and a rational appraisal of the procedural advantage of raising the statute preliminarily. Other statutes will either have been before the courts on this question or a related one requiring interpretation in accordance with the historical distinction. Where these statutes are concerned, reliance should be placed only on those appellate cases accurately applying the histori-

71. This is so at least until the close of trial, because in the absence of a showing of compliance, the complaint or counterclaim fails to *state* a sufficient claim upon which relief can be granted. PA. R. CIV. P. 1032.

72. *Id.* 1017(b)(4).

73. *Id.* 1030, 1045. Such a statute could also serve as the basis for a motion for judgment on the pleadings, *id.* 1034, or for summary judgment, *id.* 1035, or could be raised for the first time at trial, *id.* 1032.

74. 419 Pa. 42, 213 A.2d 342 (1965). There should be no doubt that the rules intended to adopt this distinction and the policy of Brown v. Hahn, *supra*. *E.g.*, Blumer v. Dorfman, 447 Pa. 131, 136 n.4, 289 A.2d 463, 467 n.4 (1972); Ziemba v. Hagerty, 436 Pa. 179, 180-81, 259 A.2d 876 (1969).

75. *E.g.*, Overmiller v. D.E. Horn & Co., 191 Pa. Super. 562, 159 A.2d 245 (1960); Swartz v. Great American Ins. Co., 65 York 91, 78 Pa. D. & C. 376 (C.P. 1951). *See also* Commonwealth *ex rel.* Fenton Storage Co. v. McClane, 154 Pa. Super. 246, 35 A.2d 745 (1944). Often such statutes of limitations are labeled statutes of repose.

76. *E.g.*, American Prods. Co. v. Refining Co., 275 Pa. 332, 119 A. 414 (1923); Mason-Heflin Coal Co. v. Currie, 270 Pa. 221, 113 A. 202 (1921); Manufacturers Light & Heat Co. v. Lamp, 269 Pa. 517, 112 A. 679 (1921); Brown v. Sheaffer, 93 Pa. Super. 246 (1928).

cal distinction. In the discussion of various statutory defenses that follows, attempt is made to point out the strength of the relevant case law.

A. *The Statutes of Limitations*

The general six year statute of limitations[77] has long been interpreted as a declaration of public policy[78] giving the defendant a permissive defense which will be waived if not pleaded.[79] Having no effect of itself, the statute cannot be raised as a preliminary objection.[80] It is similarly held that the statute of limitations for personal injuries[81] does not affect the right of recovery unless it is pleaded and consequently cannot be raised by demurrer.[82] The statute of limitations for wrongful death actions[83] has been held to be a general statute of limitations which does not condition the right of action;[84] thus it must be raised in the pleadings, and can only be raised as an affirmative defense in new matter. Other statutes have been held to be statutes of repose which can be raised at trial or by preliminary objection. Among these are included the limitations for recovery of workmen's compensation[85] and the limitation for actions against

77. PA. STAT. ANN. tit. 12, § 31 (1953).

78. *See* Ulakovic v. Metropolitan Life Ins. Co., 339 Pa. 571, 16 A.2d 41 (1940).

79. *E.g.*, Barclay v. Barclay, 206 Pa. 307, 55 A. 985 (1903); Carter v. Vandergrift, 74 Pa. Super. 26 (1920); *see* Quaker City Chocolate & Confectionery Co. v. Delhi-Warnock Bldg. Ass'n, 357 Pa. 307, 53 A.2d 597 (1947); *accord, e.g.*, Allwein v. Wilt, 13 Lebanon 198 (Pa. C.P. 1971); *contra*, Yohey v. Lacoe, 51 Pa. D. & C.2d 448 (C.P. Colum. Co. 1971).

80. PA. R. CIV. P. 1017(b)(4), 1030, 1045.

81. PA. STAT. ANN. tit. 12, § 34 (1953).

82. *E.g.*, Bellotti v. Spaeder, 433 Pa. 219, 249 A.2d 343 (1969); Stoltzfus v. Haus, 334 A.2d 738 (Pa. Super. 1975); Sykes v. Southeastern Pa. Transp. Auth., 225 Pa. Super. 69, 310 A.2d 277 (1973). In Bellotti v. Spaeder, *supra*, the court noted, "The general statute of limitations barring recovery in personal injury actions after the lapse of time is not a condition placed by the law on a substantive right . . . ." 433 Pa. at 221 n.2, 249 A.2d at 344 n.2.

83. PA. STAT. ANN. tit. 12, § 1603 (1953).

84. Echon v. Pennsylvania R.R., 365 Pa. 529, 76 A.2d 175 (1950); Prettyman v. Irwin, 273 Pa. 522, 117 A. 195 (1922); *accord*, Roman v. Allegheny Gen. Hosp., 120 Pitt. L.J. 175, 56 Pa. D. & C.2d 687 (C.P. Allegh. Co. 1971); Rusch v. Evans, 53 Westmoreland 173 (Pa. C.P. 1971); *contra*, The Katahdin, 4 F. Supp. 180 (E.D. Pa. 1933).

85. PA. STAT. ANN. tit. 77, § 602 (1952): Demmel v. Dilworth Co., 136 Pa. Super. 37, 7 A.2d 50 (1939). PA. STAT. ANN. tit. 77, § 772 (1952): Harrington v. Mayflower Mfg. Co., 173 Pa. Super. 130, 96 A.2d 180 (1953). PA. STAT. ANN. tit. 77, § 871 (1952): Overmiller v. D.E. Horn & Co., 191 Pa. Super. 562, 159 A.2d 245 (1960).

It should be noted that cases under these statutes are not private party litigation and thus the Pennsylvania Rules of Civil Procedure may not be applicable. *See* Harrington v. Mayflower Mfg. Co., 173 Pa. Super. 130, 132, 96 A.2d 180, 181 (1953). Much of what has been said in this comment may not apply to proceedings thereunder.

sureties on constable bonds.[86] However, the nature and effect of the statute of limitations relating to sales of interests in real estate is less clear.[87]

In *Royal Oil & Gas Corp. v. Tunnelton Mining Co.*,[88] the Supreme Court of Pennsylvania held that this statute of limitations could not be raised by preliminary objection. Relying solely on *Leister v. Miller*,[89] the court reasoned the statute was "waivable." The validity of the determination in *Royal Oil* thus depends in the first instance upon the appropriateness of the court's reliance on *Leister*. In *Leister*, the supreme court held that this statute of limitations did not prevent a trustee from voluntarily performing an oral trust after the period of limitations had expired. This holding was tripartite and alternative: (1) the statute did not apply, since no action had been brought to enforce the trust; (2) even if it did apply, the one whom the statute was designed to protect, the holder of legal title, could voluntarily waive its provisions; (3) even if it did apply and could not be waived, the limitations period had not run.[90]

Even assuming as in *Leister*'s second assertion that this statute of limitations could be voluntarily waived by the party it was designed to protect, it does not necessarily follow that the statute would be "waivable" in terms of the rules.[91] To say that a party may

86. PA. STAT. ANN. tit. 13, § 81 (1967): "Suits . . . shall not be sustained, unless the same shall be instituted within six years . . . ." Commonwealth *ex rel.* Fenton Storage Co. v. McClane, 154 Pa. Super. 246, 35 A.2d 745 (1944).

Other statutes have been before the lower courts. PA. STAT. ANN. tit. 12, § 44 (1953), limiting the time within which an action for forfeiture can be brought, has been construed as a statute of repose which can be raised as a preliminary objection. Commonwealth v. Musser Forests, Inc., 70 Dauph. 385 (Pa. C.P. 1957). Similarly, the statute limiting the time within which an action might be maintained against a constable or justice of the peace, PA. STAT. ANN. tit 42, § 1017 (1966), has been held to be one which qualifies the substantive right and which can be raised by demurrer. Kovachick v. Jennings, 27 Fay. L.J. 144, 34 Pa. D. & C.2d 25 (C.P. 1964); Sahd v. Kiscaden, 57 Lanc. L. Rev. 203 (Pa. C.P. 1960).

The statute of limitations provided by the Uniform Commercial Code, PA. STAT. ANN. tit. 12A, § 2-725 (1970), has not been before the Pennsylvania courts on this question, but it has been determined that the statute is "procedural" for choice of law purposes, Natale v. Upjohn Co., 356 F.2d 590 (3d Cir. 1966), and by analogy to the six year limitation for assumpsit, PA. STAT. ANN. tit. 12, § 31 (1953), will probably be deemed "waivable" and raisable only as an affirmative defense.

87. PA. STAT. ANN. tit. 12, § 83 (1953). This provision also regulates the enforcement of an equity of redemption or an implied or resulting trust. The significant language is: "No right of entry shall accrue, or action be maintained . . . but within five years . . . ." *Id.*

88. 444 Pa. 105, 282 A.2d 384 (1971).

89. 376 Pa. 452, 103 A.2d 656 (1954).

90. 376 Pa. at 455-56, 103 A.2d at 657-58.

91. *See* text accompanying notes 43-46 & 53-57 *supra*.

perform the protected activity after the period of limitations has expired without interference by the courts is to recognize a *privilege* in that person. In contrast, when a statute is interpreted as being "waivable" for pleading purposes, an *obligation* is imposed on the protected party to plead the defense or lose its benefits. While a party might be concurrently privileged and obliged in this manner, it is at least clear that these inquiries must be made separately. Another way of phrasing the issue is whether a party could have this privilege of waiver under a "nonwaivable" statute. When a statute is deemed "nonwaivable" under rules 1032 and 1017, it is interpreted as placing on the nonprotected party the *obligation* to show compliance; the protected party is given the *right* until the close of trial to require that this be done. There is no necessary effect on the privilege of waiver; a statutory defense could be both "nonwaivable" and subject to voluntary relinquishment. There may be classes of statutes, as suggested in *Leister*'s third assertion, which *prohibit* a party from performing the protected activity.[92] In such a situation the privilege of waiver would be lost. However, the statute involved in *Leister* does not prohibit the protected party from performing the agreement or trust. If he still has title to the property, he is the only person who would be affected by a suit to enforce.[93] Thus it would not be inconsistent to say that the statute could be waived voluntarily by performance or conversely raised as a defense of law which mandates that the party seeking enforcement meet its requirements.[94]

It is apparent that *Leister* is not authority for the proposition that this statute is waivable, and should not have been dispositive in *Royal Oil*.[95] To the contrary, in deciding that this statute of limitations could not be raised by preliminary objection, the *Royal Oil* court overlooked well-established case law which had determined the statute was one of repose, designed to assure greater certainty of title.[96] In these cases, it was reiterated that there could be "no

92. *E.g.*, PA. STAT. ANN. tit. 77, § 871 (1952) (Workmen's Compensation Act); *see* Overmiller v. D.E. Horn & Co., 191 Pa. Super. 562, 159 A.2d 245 (1960).

93. *See* Way v. Hooton, 156 Pa. 8, 26 A. 784 (1893).

94. *See* Sferra v. Urling, 328 Pa. 161, 195 A. 422 (1937).

95. Moreover, in declaring that PA. STAT. ANN. tit. 12, § 83 (1953) could be voluntarily waived, *Leister* relied only on cases which had held that a provision of the Statute of Frauds, PA. STAT. ANN. tit. 33, § 2 (1967), could be voluntarily waived: Williams v. Moodhard, 341 Pa. 273, 19 A.2d 101 (1941); Faunce v. McCorkle, 321 Pa. 116, 183 A. 926 (1936).

96. Ross v. Suburban Counties Realty Corp., 356 Pa. 126, 51 A.2d 700 (1947); First Pool

right of action unless asserted in accordance with the provisions of the statute."[97] Consequently, it was held that the statute could be invoked if not pleaded and taken advantage of by demurrer.[98] The diametric position asserted by the *Royal Oil* court is clearly inconsistent with this line of decisions applying the distinction endorsed by *Brown*. The logical conclusion is that the bar of this statute can be pleaded as a preliminary objection when its applicability appears on the face of the complaint or counterclaim.

B. *The Statute of Frauds*

Various though similar interpretations have been placed on those statutes which collectively comprise the Statute of Frauds. The statute relating to interests in realty[99] has been deemed by many supreme court cases to be a "waivable" defense and one which may be raised only in new matter.[100] However, each has relied directly or indirectly on *Brown v. Hahn*[101] which as pointed out previously,[102] did not analytically interpret the statute according to the historical distinction that it purported to endorse.[103]

Gas Coal Co. v. Wheeler Run Coal Co., 301 Pa. 485, 152 A. 685 (1930); Way v. Hooton, 156 Pa. 8, 26 A. 784 (1893); Douglass v. Lucas, 63 Pa. 9 (1869).

97. First Pool Gas Coal Co. v. Wheeler Run Coal Co., 301 Pa. 485, 489, 152 A. 685, 687 (1930).

98. *E.g., id., citing* American Prods. Co. v. Refining Co., 275 Pa. 332, 119 A. 414 (1923); Mason-Heflin Coal Co. v. Currie, 270 Pa. 221, 113 A. 202 (1921).

99. PA. STAT. ANN. tit. 33, § 1 (1967):

> [A]ll . . . interests of . . . lands . . . made or created . . . and not put in writing . . . shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect . . . .

100. *See, e.g.*, Charles v. Henry, 334 A.2d 289 (Pa. 1975); Royal Oil & Gas Corp. v. Tunnelton Mining Co., 444 Pa. 105, 282 A.2d 384 (1971); Portnoy v. Brown, 430 Pa. 401, 243 A.2d 444 (1968).

101. 419 Pa. 42, 213 A.2d 342 (1965).

102. *See* notes 33-39 and text accompanying *supra*.

103. *See* Haskell v. Heathcote, 363 Pa. 184, 69 A.2d 71 (1949) (this statute is not a mere rule of evidence but a limitation on judicial authority to provide a remedy), *overruled*, Brown v. Hahn, 419 Pa. 42, 213 A.2d 342 (1965); Brotman v. Brotman, 353 Pa. 570, 46 A.2d 175 (1946) (this statute is more than a rule of evidence); Axe v. Potts, 349 Pa. 345, 37 A.2d 572 (1944) (noncompliance with the statute renders the agreement unenforceable). It should be noted however that each of these cases was before a "court of equity," and it was recognized that the strict rules of common law pleading did not necessarily apply. *See* Atkinson, *Pleading the Statute of Limitations*, 36 YALE L.J. 914, 922-25 (1927); Editorial Note, 30 W. VA. L.Q. 110, 112 (1924).

A derivative of this statute relating to leases, PA. STAT. ANN. tit. 68, § 250.202 (1965), has by analogy been held to be "waivable" and capable of being raised only as an affirmative defense. Blumer v. Dorfman, 447 Pa. 131, 289 A.2d 463 (1972).

Relating to parol trusts, no appellate opinions have been found indicating whether the Statute of Frauds[104] can be pleaded as a preliminary objection or raised at trial if not pleaded. However, it was determined long ago that this statute affirmatively requires a writing in order that the parol trust be enforceable.[105] Applying the historical distinction it is reasonable to conclude that this statute should be entitled to the special status accorded "nonwaivable" acts.[106]

Of limited application but of relative importance in this area is the statute concerning promises to answer for the debt of another.[107] Discussion of this statute in *Leonard v. Martling*[108] crystallized the notion that the Pennsylvania Rules of Civil Procedure had incorporated the historical distinction to allow "substantive" statutes to be raised at trial if not pleaded. It was this statute which in *Brown v. Hahn*[109] was exemplified as "nonwaivable." That this statute can be raised as a preliminary objection is well established.[110]

There remains for discussion that section of the Statute of Frauds relating to contracts for the sale of goods in excess of $500. In Pennsylvania, the governing statute is § 2-201 of the Uniform Commercial Code.[111] While no Pennsylvania appellate opinions have been found determining whether this statute is nonwaivable for pleading purposes, it is reasonable to conclude that it would be deemed so. The current section is patterned after and is nearly identical to its predecessor, § 4 of the Uniform Sales Act,[112] which was held to

104. PA. STAT. ANN. tit. 33, § 2 (1967): "All declarations or creations of trusts . . . of any lands . . . shall be manifested by writing . . . or else to be void . . . ."

105. Safe Deposit & Trust Co. v. Diamond Coal & Coke Co., 234 Pa. 100, 83 A. 54 (1912).

106. *But cf.* Falkenstein v. Falkenstein, 92 Montg. 274, 279 (Pa. C.P. 1969).

107. PA. STAT. ANN. tit. 33, § 3 (1967): "No action shall be brought . . . to charge . . . the defendant . . . to answer for the debt or default of another, unless the agreement upon which such action shall be brought . . . shall be in writing . . . ."

108. 378 Pa. 339, 106 A.2d 585 (1954). *See* notes 19-26 and text accompanying *supra*.

109. 419 Pa. 42, 47-48, 213 A.2d 342, 344-45 (1965). *See* notes 31-32 and text accompanying *supra*.

110. *See generally* Blumer v. Dorfman, 447 Pa. 131, 289 A.2d 463 (1972).

111. PA. STAT. ANN. tit. 12A, § 2-201 (1970):

(1) *Except* as otherwise provided in this section a contract for the sale of goods for the price of $500 or more *is not enforceable by way of action or defense unless* there is some writing sufficient to indicate that a contract for sale has been made between the parties . . . .

Id. (emphasis added).

112. Sales Act of May 19, 1915, No. 241, § 4, [1915] Laws of Pa. 543:

A contract to sell or a sale of any goods . . . of the value of five hundred dollars or

render the contract unenforceable unless compliance could be shown by the party seeking enforcement.[113] Moreover, there is a distinct likeness between the language of this section and that of other provisions which have been deemed nonwaivable.[114] Lower court cases indicate agreement with this conclusion.[115]

C. *Motion for Judgment on the Pleadings*

It is worthwhile to compare the procedure available under rule 1034,[116] which provides that a party may obtain a judgment on the pleadings whenever this would be the proper remedy. This has been described as an alternative demurrer, giving a party one additional opportunity[117] to attack the sufficiency of the opponent's pleadings.[118] "Nonwaivable" statutes can be considered on review of the pleadings since the judge at this stage may inquire whether the complaint or counterclaim fails to state a cause of action.[119] More interesting, however, it is also proper to consider any admissions

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upwards *shall not be enforceable by action unless* the buyer shall accept part of the goods . . . or give something . . . in part payment, *or unless* some note or memorandum in writing of the contract or sale be signed . . . .

Id. (emphasis added).

113. *E.g.*, American Prods. Co. v. Refining Co., 275 Pa. 332, 119 A. 414 (1923); Manufacturers Light & Heat Co. v. Lamp, 269 Pa. 517, 112 A. 679 (1921); Brown v. Sheaffer, 93 Pa. Super. 246 (1928). *See also* Leonard v. Martling, 378 Pa. 339, 106 A.2d 585 (1954); Martin v. Wilson, 371 Pa. 529, 92 A.2d 193 (1952).

114. *Compare* PA. STAT. ANN. tit. 12A, § 2-201(1) (1970): "[A] contract . . . is not enforceable by way of action or defense unless there is some writing . . . ." *with* PA. STAT. ANN. tit. 33, § 3 (1967): "No action shall be brought . . . unless the agreement . . . shall be in writing . . . ." In each case, the statute proceeds with a negative mandate, and eases this by nevertheless permitting enforcement if a writing exists. The latter statute has been deemed nonwaivable by application of the historical distinction. *See* notes 107-10 and text accompanying *supra*.

115. Texas Truck Sleeper Co. v. Artman, 55 Westmoreland 13, 62 Pa. D. & C.2d 663 (C.P. 1973); United Farmers Cooperative v. Zausner, 61 Lanc. L. Rev. 279 (Pa. C.P. 1968).

In Behrman & Passell, Inc. v. Amberson Gardens, Inc., 111 Pitt. L.J. 287 (Pa. C.P. Allegh. Co. 1963), Judge Aldisert held that PA. STAT. ANN. tit. 12A, § 8-319 (1970), the Statute of Frauds relating to a sale of securities, was a total and complete defense which could be raised by preliminary objection.

116. PA. R. CIV. P. 1034.

117. However, a party cannot move for a judgment on the pleadings if no new pleadings have been filed and his preliminary objection to the same effect was overruled on the merits. *See* Penn Sec. Co. v. Sacco, 41 Luz. L. Reg. Rep. 101, 102-03 (Pa. C.P. 1950); *cf.* Dunn v. Orloff, 414 Pa. 636, 201 A.2d 432 (1964); Chivers v. School Dist., 6 Pa. Commw. 622, 297 A.2d 187 (1972).

118. 1 GOODRICH-AMRAM, *supra* note 40, §§ 1034(a)-1 to -2 (1962).

119. *See, e.g.*, Goldman v. McShain, 432 Pa. 61, 72-73, 247 A.2d 455, 460-61 (1968).

made by the opposing party in his pleadings.[120] Suppose, for example, that the plaintiff alleges a cause of action for personal injury, setting forth facts which clearly indicate that the statute of limitations[121] would be a bar to the action. In new matter, the defendant raises this statute as a defense, and endorses his answer with a notice to plead.[122] If the plaintiff fails to respond indicating that the statute is inapplicable, the defense is admitted.[123] If the defense is admitted, it may be taken advantage of on motion for judgment on the pleadings irrespective of the independent effect which the statute might or might not have on the cause of action.[124] In practical effect, any bar of the Statute of Frauds or statute of limitations which appears on the face of the complaint or counterclaim and which cannot be factually denied will be dispositive on a motion for judgment on the pleadings. However, since a motion pursuant to rule 1034 cannot be made until the pleadings are closed,[125] the prevailing party will nevertheless have had to present the entire defense in the answer and new matter; this presentation appears unnecessarily dilatory and inefficient.

IV. The Need for Reform

A. *The Practical View*

The foregoing discussion has illustrated various difficulties inherent in the current system of pleading. In advocating reform it is appropriate to emphasize that these problems arise from the choice to distinguish similar statutes by means of a conceptual analysis which is often difficult to understand and apply. These problems of application have been accentuated by two related holdings of the Supreme Court of Pennsylvania. At one time it had been held that

120. *Id.* at 73, 247 A.2d at 461. *See also* Blumer v. Dorfman, 447 Pa. 131, 139-40, 289 A.2d 463, 468-69 (1972); Bata v. Central-Penn Nat'l Bank, 423 Pa. 373, 378, 224 A.2d 174, 178 (1966).

121. Pa. Stat. Ann. tit. 12, § 34 (1953).

122. *See* Pa. R. Civ. P. 1026, 1041.

123. *Id.* 1045(b). *See also id.* 1029.

124. *See* Goldman v. McShain, 432 Pa. 61, 73, 247 A.2d 455, 461 (1968); Bermudez v. PTC, 64 Pa. D. & C.2d 462 (C.P. Phila. Co. 1973); Pierro v. Pierro, 19 Bucks 268 (Pa. C.P. 1969). When the defense is not admitted in this way, the statute can be effective on such a motion only if it is "nonwaivable." Goldman v. McShain, *supra*.

125. Pa. R. Civ. P. 1034.

a party could waive the procedural irregularity which occurred when a "waivable" statute was raised by preliminary objection, by failing to object to the irregularity.[126] *Royal Oil*,[127] however, held that the procedure laid down by rules 1017(b), 1030 and 1045(b) is mandatory and that such procedural irregularities could not be waived by the parties. Similarly, the supreme court was once willing to consider the merits of waivable defenses even though the basis of appeal was procedural irregularity, as where the defense was improperly raised by preliminary objection.[128] This expediting practice is no longer followed.[129] That these developments have attempted to encourage conscientious practice is commendable, but it must be realized that an ancillary result may be to discourage the practice of pleading such statutes preliminarily.

Rule 1017(b)(4) establishes a desirable preliminary procedure. Yet, the subtleties of applying the historic distinction may discourage the rule's usage in appropriate situations. The attorney who is unsure of the nature of the applicable statute or who has no time to research this point will raise the legal defense in new matter; this is acceptable and at times may be tactically wise, but it foregoes the available benefits of pleading the defense preliminarily. Judges who are in doubt may tend to overrule preliminary objections and require that the defense be raised in new matter, reasoning no party is prejudiced thereby. Given the average case load, the possibility of judicial error even when the issue is addressed is not so insignificant as to be ignored. The practical result may be a narrowly circumscribed procedure which is further restrained by the effects of its own inadequacies.

B. *Efficiency as a Unifying Purpose for Procedures*

It seems elementary to efficient pretrial disposition of disputes that applicable defenses be raised as soon as practicable, and if their applicability is uncontroverted, that they dispose of the case without delay.[130] This principle of efficiency underlies rule 1017(b)(4). By

126. *E.g.*, Yefko v. Ochs, 437 Pa. 233, 263 A.2d 416 (1970).

127. Royal Oil & Gas Corp. v. Tunnelton Mining Co., 444 Pa. 105, 282 A.2d 384 (1971).

128. "Nothing is to be gained by sending the parties back to the trial court to set their procedural house in order before coming once again to this Court with the identical controversy." Brown v. Hahn, 419 Pa. 42, 50, 213 A.2d 342, 346 (1965). *See also* Callery v. Blyth Twp. Mun. Auth., 432 Pa. 307, 243 A.2d 385 (1968) (res judicata improperly pleaded).

129. *E.g.*, Ziemba v. Hagerty, 436 Pa. 179, 259 A.2d 876, *rev'g* 214 Pa. Super. 381, 261 A.2d 342 (1969); Portnoy v. Brown, 430 Pa. 401, 407, 243 A.2d 444, 448 (1968).

130. *See, e.g.*, F. JAMES, JR., CIVIL PROCEDURE 2, 132-33 (1965) [hereinafter cited as

permitting a party to raise certain defenses as objections this rule saves the parties and the judicial system the cost and effort of protracted proceedings the outcome of which can be determined preliminarily.[131] Administrative efficiency will be served, however, if any statute of limitations or provision of the Statute of Frauds could be raised preliminarily when clearly applicable. The *reason* for the exception afforded by rule 1017(b)(4) would apply regardless of the nature and effect of the statutory bar.

It is true, as it has been suggested,[132] that a defending party may avail himself of any statutory provision by moving for summary judgment under rule 1035[133] and as discussed above,[134] by moving in certain circumstances for judgment on the pleadings pursuant to rule 1034. Nevertheless, these procedures are not the most efficient methods of raising a legal defense which clearly appears on the face of the claim; both require that the entire defense be set forth. Even when a statutory defense is a clear bar, most attorneys may feel compelled to allege all alternative defenses, both of law and of fact, in the answer and new matter. Since these may not be necessary, potential if not real inefficiency results. Moreover, to argue that the summary judgment or judgment on the pleadings procedure satisfactorily permits attorneys to raise "waivable" statutory defenses implies that there is *no need* for the preliminary objection procedure.

JAMES]; Atkinson, *Pleading the Statute of Limitations*, 36 YALE L.J. 914, 918 (1927).

Under some systems of procedure, *e.g.*, the Federal Rules of Civil Procedure, there is an apparent tension between the rules governing the sufficiency of the complaint, which require only "notice" of a cause of action, and those governing dismissal upon failure to provide such notice. *Compare* FED. R. CIV. P. 8(a), *with* FED. R. CIV. P. 12(b). The willingness of courts to dismiss an action preliminarily is accordingly dependent upon the degree of specificity required of the pleadings as well as the availability of amendment as of course.

131. [T]his Court has repeatedly and wisely sustained preliminary objections where plaintiff's complaint or pleading shows on its face that his claim is devoid of merit. This is wise, because if the law or the rule were otherwise, it would mean long and unnecessary delays in the law—delays which Courts are strenuously trying to eliminate or reduce—and it could not aid plaintiff at the trial or affect the result . . . .

Greenberg v. Aetna Ins. Co., 427 Pa. 511, 518, 235 A.2d 576, 579 (1967) (citations omitted).

132. Mangino v. Steel Contracting Co., 427 Pa. 533, 534, 235 A.2d 151, 152 (1967); Greenberg v. Aetna Ins. Co., 427 Pa. 511, 521, 235 A.2d 576, 581-82 (1967) (Jones, J., dissenting); *id.* at 523-24, 235 A.2d 580 (Cohen, J., dissenting). These assertions may evidence a sense of pride in the recent institution of the summary judgment procedure in Pennyslvania. *See* Arensberg, *Summary Judgment: Partial Cure for Delay?*, 33 PA. B. ASS'N Q. 278 (1962).

133. PA. R. CIV. P. 1035.

134. *See* notes 116-25 and text accompanying *supra*.

The Pennsylvania Rules of Civil Procedure have attempted to further administrative efficiency by the adoption of a legal fiction designed to accord certain statutory defenses a preferred status.[135] This choice was made to exact the most from the traditionally limited conception of the demurrer. Only when a defense operated such that the complaint failed to *state* a legally sufficient cause of action could it be the basis of a demurrer. The demurrer, though, differs greatly from its common law origins,[136] and it should be open to question whether its inherent limitations should proscribe the procedures to be followed today. "As we know, a great deal of legal reform [has come] through the use of legal fictions."[137] The tool adopted by the rules, the nature and effect of the statute, has as its only purpose procedural efficiency. It is time to discard this fiction, for its function of pointing out the efficiency which can be realized is complete. Procedural reform in this instance must take as its primary goal and only restraint the efficient administration of justice.[138]

C. *Suggested Reform*

It is proposed that a procedure be established which will allow a party to raise *any* affirmative defense by preliminary objection when "the applicability of [the defense] appears on the face of the complaint or counterclaim."[139] If not controverted by a proper amendment to the statement of claim,[139.1] the objection would be sustained. So long as the complainant is afforded the opportunity through amendment to raise any potential reply to an affirmative defense, procedural efficiency would be maximized by preliminary

135. It is worthwhile to compare the federal system, where the same problem exists, and where the courts have no identifiable tool to work with. The cases are divided as to whether the defenses of a statute of limitations or the Statute of Frauds can be raised on a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6), roughly equivalent to the Pennsylvania preliminary objection procedure. *See generally* 35B C.J.S. *Federal Civil Procedure* §§ 814, 817 (1960).

136. *See* JAMES, *supra* note 130, at 127-28. At early common law, the demurrer was treated as a final disposition of the case, whatever the outcome. Today, its procedural effectiveness has been diluted by enactments permitting the amendment of a defective complaint or the pleading over of the defense.

137. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 195 (1958).

138. *See generally* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS *passim* (1971).

139. PA. R. CIV. P. 1017(b)(4).

139.1. *See* PA. R. CIV. P. 1028(c).

disposition of the case.[140] An example of the operation of such a procedure under differing factual assumptions is noted below.[141] All other characteristics of the preliminary objection and related procedures would remain unchanged. For instance, no defense could be

140. *See* JAMES, *supra* note 130, at 132-33.

141. The following hypothetical will be helpful in explaining the operation of such a procedure as applied to the defense of the statute of limitations. It is assumed that no facts exist which might toll the running of the statute.

Plaintiff *A* alleges in his complaint that on May 1, 1971, defendant *B* physically assaulted him. The complaint was filed on June 15, 1973, but can be considered otherwise sufficient. *B* files a preliminary objection on the basis of the two year statute of limitations for personal injuries, PA. STAT. ANN. tit. 12, § 34 (1953).

If the facts are as alleged, there is no reason why the complaint should not be dismissed preliminarily. Requiring the defendant to plead the defense affirmatively only subjects all concerned, both parties and the courts, to unnecessary delay, expenditure of time and expense. This is particularly so because it requires the defendant to prepare his answer on the merits, and postpones the decision of the court to the more involved summary judgment procedure.

If the facts are not as alleged, determination hinges upon the actual facts not alleged. Had a simple mistake been made in the typing of the complaint, *A* would be permitted to correspondingly amend the pleading by addition of the appropriate date (*e.g.*, May 1, 1972). This would be so even if the amendment took place more than two years subsequent to the actual date of the occurrence, since no *new* cause of action would have been set up. Bata v. Central-Penn Nat'l Bank, 448 Pa. 355, 293 A.2d 343 (1972); Saracina v. Cotoia, 417 Pa. 80, 208 A.2d 764 (1965); *see* PA. R. CIV. P. 1033. Once this amended pleading is filed, *B*'s preliminary objection on the basis of the statute of limitations would be inapplicable and thus dismissed.

If the facts were as pleaded, but *in addition*, *B* had assaulted *A* on May 1, 1972, then the appropriateness of the amendment would depend upon the timing of the amendment, since the amended pleading would allege a *new* cause of action. If filed before May 1, 1974, the amendment would be permitted since the additional cause of action would have been filed within the two year limitation period. In such a case, the preliminary objection would similarly have to be overruled since the complaint as amended alleged a sufficient claim. If the amendment were to be filed subsequent to May 1, 1974, then under rule 1033 and *Bata* it could not be accepted, for it would be alleging a new cause of action after the limitation applicable thereto had run. In this case, there would again be no reason for requiring that *B* wait to replead the statute of limitations as an affirmative defense, for the reasons outlined above. Moreover, it would seem particularly inconsistent to recognize the running of a later period of limitations by refusing amendment while ignoring at the same procedural stage the running of an earlier one by refusing to consider it on preliminary objection. As to amendments and what constitutes a new cause of action, see Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 135, 319 A.2d 914 (1974); Sykes v. Southeastern Pa. Transp. Auth., 225 Pa. Super. 69, 310 A.2d 277 (1973).

Where a bar of the Statute of Frauds is involved, the application of the suggested procedure is even simpler. In such a situation, the objection based on the statutory bar appearing on the face of the claim would be sustained unless the plaintiff could move to amend the statement of claim to allege facts which would take the case out of the statute.

These illustrations merely reflect current practice under liberal rules of amendment; the only change is that the case is either clarified or disposed of earlier—the goal of efficient pretrial procedures.

sustained by this amended procedure unless the case were clear and free from all doubt.[142]

A brief glance at practice under the Federal Rules of Civil Procedure will illustrate the willingness of many courts to broadly determine when a complaint fails to set forth an adequate claim. Rule 12(b)(6)[143] provides that the defense of failure to state a claim upon which relief can be granted may be raised by a motion to dismiss. The prevailing view is that the affirmative defense of any statute of limitations or the Statute of Frauds may be raised by such a motion if there is no question of fact as to the existence of the defense.[144] No conceptual distinction based upon the nature of the act is employed;[145] instead the emphasis is upon whether a valid legal defense will defeat the right of recovery.[146] It is often said that rule 9(f),[147] which makes time a material allegation, allows a party to test the sufficiency of a pleading under rule 12(b)(6) on the basis of the statute of limitations.[148] For the Statute of Frauds, it is similarly reasoned that allowing such a defense to be raised under rule 12(b)(6) when the claim indicates its application is the more logical procedure.[149]

The Pennsylvania courts have been willing to consider the broader effects occasioned by raising certain other affirmative de-

142. *E.g.*, Adams v. Speckman, 385 Pa. 308, 122 A.2d 685 (1956). If any factual issues arise out of the amendment of the statement of claim, disposition thereof should await trial or, where appropriate, summary judgment proceedings. *Cf.* FED. R. CIV. P. 12(b).

143. FED. R. CIV. P. 12(b)(6).

144. *E.g.*, Sherwin v. Oil City Nat'l Bank, 18 F.R.D. 188 (W.D. Pa. 1955) (statute of limitations); *see, e.g.*, Hanna v. United States Veterans' Admin. Hosp., 514 F.2d 1092 (3d Cir. 1975) (statute of limitations); Continental Collieries v. Shober, 130 F.2d 631 (3d Cir. 1942) (Statute of Frauds); Patitucci v. United States, 178 F. Supp. 507 (E.D. Pa. 1959) (statute of limitations); Cohen v. Johnson, 8 F.R.D. 37 (M.D. Pa. 1948) (Statute of Frauds).

145. *But see, e.g.*, Sikes v. United States, 8 F.R.D. 34 (E.D. Pa. 1948).

146. *E.g.*, Beal v. General Motors Corp., 354 F. Supp. 423, 429 (D. Del. 1973).

147. FED. R. CIV. P. 9(f).

148. *E.g.*, Hanna v. United States Veterans' Admin. Hosp., 514 F.2d 1092, 1094 (3d Cir. 1975); Sherwin v. Oil City Nat'l Bank, 18 F.R.D. 188 (W.D. Pa. 1956). *Compare* PA. R. CIV. P. 1019(f), which provides that averments of time shall be specifically stated in the pleadings. *See also* Barclay v. Barclay, 206 Pa. 307, 310, 55 A. 985, 986 (1903), where the court states: "The statute of limitations is a defense upon facts, and must be pleaded. It cannot be made by a demurrer which raises only an issue of law." The *Barclay* case has played a significant role in the development and application of the historical distinction in Pennyslvania pleading practice. *See, e.g.*, Editorial Note, 30 W. VA. L.Q. 110, 111 n.5 (1924).

149. *E.g.*, Continental Collieries v. Shober, 130 F.2d 631, 635-36 (3d Cir. 1942). In Pennsylvania, claims based on a writing must give notice of the fact and attach a copy if available; otherwise the court may assume there is no writing as the basis of the action. *See* PA. R. CIV. P. 1019(h).

fenses. "It is settled that laches may be raised and determined by preliminary objection if laches clearly appears in the complaint."[150] The affirmative defense of res judicata may be raised and determined by preliminary objection where "the plaintiffs' complaint sets forth in detail, either directly or by reference, the facts and issues pleaded by the prior suit."[151] Neither of these defenses affirmatively conditions the right of recovery nor renders the complaint prima facie insufficient; both will be waived under rule 1032 if not pleaded.[152] By condoning the practice of sustaining these defenses on preliminary objection, the Supreme Court of Pennsylvania has adopted in principle the functional approach towards preliminary objections espoused in this comment.

Adoption of the preliminary objection procedure suggested herein may not entirely forego the need for the historic distinction and its accompanying difficulties. Some standard will still be needed to determine which statutes can be raised at trial if not pleaded.[153] Assuming that the historical distinction is appropriate for this purpose, this partial justification for its existence does not establish the desirability of its continued use under rule 1017. Whether a particular statute is "waivable" or "nonwaivable" hardly seems the proper test for determining the permissible time of pleading, for the validity of a party's choice will not be in issue unless the statute has been pleaded as a preliminary objection and therefore not waived.[154] If not employed in the preliminary objection procedure, the confusion caused by the distinction will not discourage attorneys from properly invoking this procedural stage; the difficult question of

150. Holiday Lounge, Inc. v. Shaler Enterprises Corp., 441 Pa. 201, 204, 272 A.2d 175, 177 (1971) (citations omitted). *But see* Rose Tree Media School Dist. v. Department of Pub. Instruction, 431 Pa. 233, 238-39, 244 A.2d 754, 756 (1968).

151. Kiely v. Cunningham Equip., Inc., 387 Pa. 598, 601-02, 128 A.2d 759, 760 (1957). *See also* Greenberg v. Aetna Ins. Co., 427 Pa. 511, 235 A.2d 576 (1967); Chivers v. School Dist., 6 Pa. Commw. 622, 297 A.2d 187 (1972).

152. *See* Posternack v. American Cas. Co., 421 Pa. 21, 218 A.2d 350 (1966) (defense of res judicata will be waived under rule 1032 if not pleaded); Pennsylvania R.R. v. Brownstein, 182 Pa. Super. 65, 125 A.2d 618 (1956) (defense of laches must be pleaded); Lang v. Recht, 171 Pa. Super. 605, 91 A.2d 313 (1952) (res judicata is waived if not pleaded).

153. PA. R. CIV. P. 1032.

154. The reply to this rhetorical statement is, of course, that the use of the historical distinction under rule 1017 is but a tool to find those statutes which by their mandatory or substantive nature result in a failure to state a claim upon which relief can be granted. PA. R. CIV. P. 1032. If the limited perception of the demurrer is retained as that which governs the scope of a preliminary objection, the distinction and its difficulties must also be retained.

whether a statute is "nonwaivable" under rule 1032 will only be before the trial court when the defense has been overlooked. In short, by limiting the distinction to true waiver situations, the difficulties inherent in its application will arise less frequently and only upon necessity.

V. Conclusion

There is an admitted jurisprudential need for an analytical understanding of the nature and effect of a statutory defense. Nevertheless, there is no justification for employing such an analysis of the substantive law to determine the pleading procedures to be followed. Every affirmative defense which is legally cognizable will, upon proof of the operative facts and invocation by the defendant, have legal significance. When the plaintiff alleges those very facts and defendant raises the defense, litigation should terminate unless avoidance is possible through amendment.

Consideration should be given to adopting a procedure which, like the one suggested here, focuses preliminarily upon whether a valid legal defense will defeat the alleged right of recovery. But if change is not desired by those with the power to effect it, further clarification of the present procedures is essential to aid courts and advocates in their application of the conceptual distinction incorporated into the rules.

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